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91-1794

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1992

ANN WALKER,

Petitioner,

v.

ANDERSON ELECTRICAL CONNECTORS,
a Subsidiary of Square D Company

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

This case presents issues which are identical to those for which certiorari was granted in *Estate of Farrar v. Cain and Hobby*, 941 F.2d 1311 (5th Cir. 1991), *cert. granted*, 112 S.Ct. 1159 (1992). This Court's decision in *Farrar* will be dispositive of the present case.

The Eleventh Circuit is one of two circuits which erroneously focuses on the *formality* of the relief obtained rather than the *effect* which the lawsuit has upon the legal relationship of the parties in deciding whether the plaintiff is a "prevailing party" entitled to an award of attorney's fees. Like the Fifth Circuit in *Farrar*, this approach of the Eleventh Circuit conflicts with that of the Ninth and Second Circuits which control fee entitlement by the effect of the lawsuit rather than the formality of the relief obtained. Compare *Romberg v. Nichols*, 953 F.2d 1152, 1159 (9th Cir. 1992) and *Ruggiero v. Krzeminski*, 928 F.2d 558 (2nd Cir. 1991) to *Farrar, supra*, and the present case at App. 1.

Accordingly, like *Farrar*, this case presents the question of whether fee entitlement should be controlled by the material alteration of the parties' legal relationship or by the mere existence of formal relief, such as nominal damages.

LIST OF PARTIES

The parties to this case in the Court of Appeals were as follows:

Ann Walker

Anderson Electrical Connectors, a subsidiary of Square D Company

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OPINIONS BELOW

The Opinion of the Court of Appeals is reported as *Walker v. Anderson Electric*, 112 F.2d 1159 (1991), and is reproduced in the Appendix at page A-1. The Court of Appeals denied the petitioner's Petition for Rehearing on January 6th, 1992. The denial of the Petition for Rehearing is reproduced in the Appendix at page A-1.

JURISDICTION

The judgment of the Court of Appeals was entered on October 18, 1991. The petitioner filed a timely Petition for Rehearing. On January 9, 1992, the Court of Appeals denied the Petition for Rehearing. The jurisdiction of this Court is invoked under 28 USC Section 1254(1).

STATUTES INVOLVED

Section 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), is relevant to this case and provides as follows:

> In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

STATEMENT OF THE CASE

A jury verdict was entered in the district court finding the defendant guilty of sexual harassment in violation of Title VII of the Civil Rights Act of 1964.[1] The trial court found that the jury verdict obviated the need for injunctive relief because the

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[1] The Eleventh Circuit correctly noted that " [t]he jury found that Anderson Electrical had committed acts of sexual harassment against Walker in violation of Title VII and had invaded Walker's privacy", but "the jury also

verdict alone "provided adequate warning to Anderson Electrical and sufficient guarantee against future sexual harassment". Nevertheless, the plaintiff was held not to be a prevailing party because she did not obtain any *formal* injunction, declaratory relief or nominal damages. These formal remedies were denied because they were mistakenly not preserved in the pretrial order and because the jury verdict was found to have served the same purpose and made them unnecessary. She was denied back-pay on a jury finding that the sexual harassment did not "cause plaintiff to lose any time from work".

Thus, the plaintiff obtained some of what she sought by bringing this suit, but not everything. The denial of back-pay was not appealed, but the other issues were. This Petition only addresses the denial of attorney's fees.

The Eleventh Circuit affirmed the denial of attorney's fees, holding that "to be a prevailing party . . . requires the attainment of something more tangible than a jury finding of sexual harassment". App. 12. The absence of a *formal* injunction and nominal damage award was held fatal to her status as a prevailing party despite the trial court's finding that the jury verdict *informally* served the same purpose by "providing adequate warning to Anderson Electrical and a sufficient guarantee against future sexual harassment". The circuit court reasoned that a jury verdict of sexual harassment which provides such "warning" and "guarantee" does not "materially alter" the relationship between the woman who was sexually harassed and the Company which harassed her. Why such a change in their relationship would not occur in that situation was not fully explained by the Circuit court, although the lack of a formal court imposed remedy was stressed. App. 12.

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found that Walker had sustained no monetary damages . . . as a proximate consequence of these violations". *Walker v. Anderson Electrical*, 944 F.2d 841 (11th Cir. 1991). The jury verdict on special interrogatories is set forth in footnote 4 of that Opinion. App. 1. While the plaintiff could not obtain true compensatory or punitive damages under Title VII as it existed at the time of trial, she sought back-pay which was allowable.

REASONS FOR GRANTING THE WRIT

I

The Petition Presents Issues Identical To Those Pending Before the Court In *Farrar*.

The outcome of the present case will be controlled by this Court's decision in *Estate of Farrar v. Cain and Hobby* 941 F.2d 1311 (5th Cir. 1991), *cert granted*, 112 S.Ct. 1159 (1992), because it presents an issue which is identical to the issue before the Court in *Farrar*, viz: whether fee entitlement should depend on the *formality* of the relief awarded in a civil rights action rather than the *effect* which the lawsuit has had on the relationship between the parties.

Due to the similar nature of the issues pending before this Court in *Farrar* and the present case, petitioner argues that the appropriate course of action would be for this Court to grant the petition for certiorari and summarily rule on the issue and merits presented therein after it has decided *Farrar*. This course of action is in line with the manner in which this Court has previously handled situations in which petitions for certiorari have addressed identical issues. See e.g. *Helvering v. Weise*, 292 U.S. 614 (1934).

II

The Circuits Are Split In The Interpretations Of This Court's Decisions In *Hewitt*, *Rhodes*, and *Texas Teacher's Association*.

Currently, there is a split in the Circuits in determining the test for fee entitlement. In the Eleventh and Fifth Circuits, the formality of relief controls fee entitlement rather than the material alteration of the parties' legal relationship, but in the Second and Ninth Circuits, the opposite is true. Compare *Romberg v. Nichols*, 953 F.2d 1152, 1159 (9th Cir. 1992) and *Ruggiero v. Krzeminski*, 928 F.2d 558 (2nd Cir. 1991) with *Estate of Farrar v. Cain and Hobby*, 941 F.2d 1311 (5th Cir. 1991), *cert*

granted, 112 S.Ct. 1159 (1992), and the present decision below at App. 8-12. The approach of the Second and Ninth Circuits comports with this Court's decisions in *Hewitt v. Helms*, 482 U.S. 755 (1987), *Rhodes v. Stewart*, 488 U.S. 1, 109 S.Ct. 202 (1988), and *Texas State Teachers v. Garland Ind. Sch. Dist.*, 489 U.S. 782, 109 S.Ct. 1486 (1989). The holding of the Eleventh Circuit below and the Fifth Circuit in *Farrar, supra*, are unacceptable under these cases because denial of a fee was premised on the lack of formal relief rather than on analysis of the materiality of the alteration of the parties' legal relationships, as required by this Court in *Texas State Teachers, Hewitt*, and *Rhodes*.

The court below held that being a prevailing party for purposes of attorneys' fees "requires *something more tangible* than a jury finding of sexual harassment". App. 12. The only thing "more tangible" that the plaintiff could have received was a formal injunction (or some other formal remedy) because the trial court found that the jury verdict informally achieved the same thing as an injunction by "providing adequate warning to Anderson Electrical and a sufficient guarantee against future sexual harassment". The circuit court did not disagree with this finding, but still required the plaintiff to achieve "something more tangible" than that. This requirement is in direct conflict with previous holdings of this Court.

In *Maher v. Gagne*, 448 U.S. 122, 129, 100 S.Ct. 2570, 2575, 65 L.Ed.2d 653 (1980), this Court held that "[n]othing in the language of § 1988 conditions the District Court's power to award fees . . . on a judicial determination that the plaintiff's rights have been violated". *Id.* The *Maher* Court noted that the Congressional history "expressly stated that 'for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights . . . without formally obtaining relief". *Id.* 448 U.S. at 129 [quoting S. Rep. #94-1011, p. 5 (1976), U. S. Code Cong. & Admin. News 1976, pp. 5508, 5512]. Similarly, in *Hewitt v. Helms*, 107 S.Ct. 2672, 2676 (1987), this Court has held that "[i]t is settled law, of course,

that relief need not be judicially decreed in order to justify a fee award".

It is well established that "[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute". *Texas Teachers Assn. v. Garland Ind. Sch. Dist.*, 489 U.S. 782, 791-793 (1989). The trial court below found that the jury verdict was the equivalent of formal injunctive relief because it "provided adequate warning to Anderson Electrical and a sufficient guarantee against future sexual harassment". The Eleventh Circuit did not disagree with this finding of fact or reverse it as clearly erroneous, but nevertheless held that the jury verdict amounted to "nothing more" than "'the moral satisfaction of knowing that a federal court concluded that his rights had been violated' ". App. 12.

That ruling creates error of exceptional public importance because a jury verdict of sexual harassment is not merely "the moral satisfaction" of knowing your rights have been violated. It is much more. As the trial court found, it is "adequate warning to Anderson Electrical and a sufficient *guarantee* against future sexual harassment". It is also a formal rejection of the Company's mistaken belief that sexual harassment is not occurring or that it is not sufficiently "severe or pervasive" to alter the conditions of women's employment or to create an abusive working environment". The jury verdict further told the defendant Company that it "should have known of the sexual harassment" and "failed to take sufficient remedial action" to prevent it.[2]

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[2] The jury was instructed that the Eleventh Circuit requires these things be proven by the plaintiff in order to return a verdict of harassment and the jury verdict is presumed to be in accordance with such instructions. *Lindsey v. American Cast Iron Pipe Co.*, 810 F.2d 1094, 1097 n. 1 (11th Cir. 1987); *Berndt v. Kaiser v. Aluminum*, 789 F.2d 253, 261 (3rd Cir. 1986). The law of this Circuit requires those same findings to support a jury verdict of sexual harassment. *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900, 905 (11th Cir. 1988).

To hold that these things do not alter the relationship between the woman who is sexually harassed and her employer creates error of exceptional importance for three reasons. First, it would be incredible to assume that a verdict of pervasive sexual harassment does not alter the defendant's conduct. For such a material change not to occur from a jury verdict of sexual harassment would require a callous disregard toward such things.

Second, sexual and racial harassment cases have often involved nothing more than what was achieved by the current jury verdict. Until the recent changes in the law, damages were not available under Title VII. Nor is back-pay usually involved when the plaintiff does not lose time from work (as in this case).[3] Injunctive relief accomplishes nothing more than what the trial court found the jury verdict itself accomplished here. Thus, if the alteration of the parties' relationship was not enough in the present case, it will likely not be enough in any case of sexual or racial harassment and fees will often be unavailable in such actions as a result.

Third, the Circuit Court opinion hinges fee entitlement on the precarious distinction between verdicts which have a one dollar nominal damage and those that do not. The law of the

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[3] Admittedly the plaintiff did not achieve all the relief she sought in the lawsuit, but that is not required. All that is required by this Court and this Circuit is that she "achieve some of the benefit sought in bringing suit". *Texas State Teachers Assn. v. Garland Ind. Sch. Dist.*, 489 U.S. 782 (1989); *Crowder v. Housing Authority of Atlanta*, 908 F.2d 843, 848-50 (11th Cir. 1990). The mere fact that she gained no back-pay because she "suffered no lost time from work" does not affect her status as the prevailing party. This Court has also held that damages are not essential to a Title VII attorney fee award in instances where sexual harassment was at issue. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 2404-05, 91 L.Ed. 49 (1986) ("First, the language of Title VII is not limited to 'economic' or 'tangible' discrimination".). This Court has directly held that a monetary judgment is not necessary in order to be the prevailing party. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415, 95 S.Ct. 2362, 2370, 45 L.Ed.2d 280 (1975); *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, 88 S.Ct. 964, 965 (1968); *City of Riverside v. Rivera*, 477 U.S. 561, 574, 106 S.Ct. 2686, 2694, 91 L.Ed.2d 466 (1986).

majority of circuits holds that such a one dollar award will make the plaintiff a prevailing party. *Romberg v. Nichols*, 953 F.2d 1152 (9th Cir. 1992) (allowing attorney's fees where only nominal damages were awarded, and discussing the award of attorney's fees in other circuits where only nominal damages were awarded).

It is an untenable position for the law to allow a one dollar nominal award for sexual harassment to create a right to attorney's fees, but an *identical* verdict without the one dollar attached does not. Attorney's fees should not hinge on such a flimsy distinction. Such a view focuses too much on the formality of the relief, rather than the effect on the parties. It thereby violates the clear holdings of this Court which command that the formality of the relief is unimportant. Where a plaintiff obtains a jury verdict of sexual harassment sufficient to violate Title VII and sufficient to "guarantee against further sexual harassment", she is just as deserving to be paid her attorney's fees as a plaintiff who obtains a one dollar nominal damage award. It is the substance and effect of the verdict, not its outward form, which is crucial to the determination of whether she is prevailing.[4] *Texas Teachers Association v. Garland Ind. Sch. District*, 489 U.S. 782, 791-93 (1989). It is obviously not the one dollar nominal award itself which alters a legal relationship in a manner Congress sought to promote, but the end of the harassment and the end of the defendant's denial of its existence which accomplishes that alteration.

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[4] It is not the one dollar award which makes the plaintiff prevail, but what it represents. It *represents* the material alteration of the legal relationship between the parties that is *caused* by the jury verdict, but the one dollar is not the alteration itself. The alteration occurs with or without the nominal award. It is the jury verdict that causes such alteration of the parties' relationship by ending the defendant's denial that the harassment occurred and ending its claim that it is not responsible because it took adequate steps to prevent it. Only with that verdict can the "guarantee against future harassment" be sufficient to obviate injunctive relief. The nominal damage without the verdict does not obviate injunctive relief or cause such an alteration of the party's legal relationships.

In *Texas State Teachers, supra,* this Court held that the plaintiff was the prevailing party even though he only obtained a court *ruling* on a "minor" claim and there was no monetary or injunctive relief which flowed from that ruling. That decision recites only a district court "finding" of a violation and implicitly notes that there was no relief awarded for this violation. The underlying Court of Appeals' decision was even clearer when it explicitly stated that "no relief was given with respect to this holding". *Texas State Teachers v. Garland Ind. Sch. Dist.*, 777 F.2d 1046, 1050 n. 5 (5th Cir. 1985). Thus, this Court has squarely held that a finding of a violation is sufficient to become a prevailing party without *any* formal relief flowing from that finding so long as it results in a "material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute". *Id.* 109 S.Ct. at 1493. It is that effect, and not the existence *vel non* of formal court remedies, which is the "touchstone" for fee entitlement. *Id.*

The very cases relied upon by the circuit court hold that it is not the formality of a judgment which makes the plaintiff a prevailing party, but "some action or cessation of action by the defendant that the judgment produces". *Hewitt v. Helms*, 482 U.S. 755, 761-762 (1987); *Rhodes v. Stewart*, 488 U.S. 1, 109 S.Ct. 202, 203 (1988). Even where a formal judgment is achieved, that will not be enough to become a prevailing party if it fails to alter the relationship between the parties because "the real value of the judicial pronouncement . . . is in settling some dispute *which affects the behavior of the defendant toward the plaintiff.*" *Hewitt, supra,* 482 U.S. at 761 (emphasis in original); *Rhodes, supra,* 488 U.S. 1, 109 S.Ct. at 203. The jury verdict below clearly satisfies this test. The award of one dollar in nominal damages would add nothing more to the change in relationship. A distinction between verdicts with a one dollar award and those without it is simply not an adequate basis for deciding who is a prevailing party.

The circuit court recited these principles of law, but in applying them it reached the wrong conclusion when it equated the jury verdict here to mere "moral satisfaction" of the type

involved in *Hewitt v. Helms, supra.* That court mistakenly thought that the plaintiff in *Hewitt* had achieved a "finding of a due process violation" and was arguing this finding to be sufficient to trigger attorney's fees. This Court, however, made it clear that *Hewitt* had *lost* "on all of his claims" on summary judgment, that his case was *never tried* on any issue, that he never received a verdict or judgment on *any issue*, and that he did *not* obtain relief informally "without benefit of a judgment". *Id.* 482 U.S. at 757-760. Instead of a "finding of a due process violation", this Court stated that "[t]he most that [Hewitt] obtained was an interlocutory ruling that his complaint should not have been dismissed for failure to state a constitutional claim". *Hewitt v. Helms*, 482 U.S. 755, 760 (1987). It was in this limited and much different context that this Court spoke of mere "moral satisfaction". *Id.* at 760 and 762. This Court did not make those statements about a jury verdict which was found to be tantamount to an injunction. It was only this misreading of *Hewitt* which allowed the circuit court to equate the jury verdict here to the "interlocutory ruling that [Hewitt's] complaint should not have been dismissed for failure to state a claim".

The same defect occurs in the Eleventh Circuit's reliance on *Rhodes v. Stewart*, 488 U.S. 1, 109 S.Ct. 202 (1988). The circuit court held that the plaintiff had a lesser status than in *Rhodes* because she "did not attain even a declaratory judgment as did the plaintiff in *Rhodes*". That is exactly the *opposite* of what *Rhodes* holds. That decision holds that it is *unimportant* whether a formal declaratory judgment is entered because a plaintiff prevails where he "affects the behavior of the defendant towards the plaintiff" regardless of whether he does so formally or informally.[5] The appellate court reached the opposite re-

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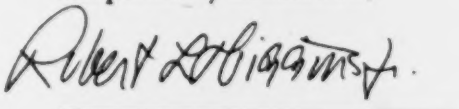
[5]The circuit court ignored the most important part of the holding in *Hewitt* and *Rhodes*. Those two decisions held that "[i]t is settled law . . . that relief need not be judicially decreed in order to justify a fee award under § 1988". *Hewitt v. Helms*, 482 U.S. 755, 760 (1987); *Rhodes v. Stewart*, 488 U.S. 1, 109 S.Ct. 202, 203 (1988). They adopted the catalyst test, rather than rejecting it, when they held that "[a] lawsuit sometimes produces voluntary

sult by making the achievement of a formal remedy a "first step on the road to obtaining relief and affecting the behavior of the defendant towards the plaintiff". App. 11. The decision in *Rhodes* and *Hewitt* do not make formal relief a necessary "first step on the road to obtaining relief", but hold that such formal relief is neither necessary (*Hewitt*) nor important (*Rhodes*). The court of appeals did the opposite by making formal relief not only important, but essential, thereby violating the Supreme Court's holdings in *Rhodes, Hewitt* and *Texas State Teachers*.

Respectfully submitted,



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action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment — e.g. . . . a change in conduct that redresses the plaintiff's grievances". *Id.* The Court held that "[w]hen that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor". *Hewitt v. Helms*, 482 U.S. at 761 [citing *Maher v. Gagne*, 448 U.S. 122, 129 (1980)]. The Court further held that it makes no difference whether the relief comes formally or informally because "[a]t the end of the rainbow lies not a judgment, but some action or cessation of action by the defendant that the judgment produces — the payment of damages, or some specific performance, or the termination of some conduct". *Id.*

CERTIFICATE OF SERVICE

This is to certify that a copy of the above and foregoing has been served by United States mail, postage prepaid and properly addressed on Mr. William F. Gardner, Attorney at Law, 1700 AmSouth/Sonat Tower, Birmingham, Alabama 35203.

This the 8th day of May, 1991.

Robert L. Wiggins, Jr.

ROBERT L. WIGGINS, JR.

APPENDIX

A-1

Ann WALKER, Plaintiff-Appellant,

v.

ANDERSON ELECTRICAL CONNECTORS, a Subsidiary of Square D Company, Defendant-Appellee.

No. 90-7636.

United States Court of Appeals,

Eleventh Circuit.

Oct. 18, 1991.

Appeal from the United States District Court for the Northern District of Alabama.

Before FAY and COX, Circuit Judges, and MORGAN, Senior Circuit Judge.

FAY, Circuit Judge:

Plaintiff-Appellant, Ann Walker ("Walker") appeals the outcome of several post-trial motions in which the district court ruled that Walker was not entitled to declaratory or injunctive relief, nominal damages, or attorneys fees, despite a jury finding of sexual harassment and invasion of privacy. For the reasons that follow, we AFFIRM.

I. BACKGROUND

In August 1989, Ann Walker sued both her employer, Anderson Electrical Connectors ("Anderson Electrical"), and her union, Local Lodge 2601, International Association of Machinists & Aerospace Workers, AFL-CIO, under Title VII of the Civil Rights Act of 1964,[1] claiming that they "condoned and

[1] 42 U.S.C. § 2000e *et seq.*

allowed [her] to be sexually harassed by management and personnel for a continuous period, making her working conditions intolerable." Walker also brought pendent state tort claims against Anderson Electrical for invasion of privacy and outrage.[2]

Initially, Walker's complaint contained a demand for jury trial only on the pendent tort claims. Following publication of an opinion in which the same district court judge permitted the use of a jury trial to resolve Title VII claims,[3] however, Walker successfully added her Title VII issues to the list of other issues to be heard by the jury. *Walker v. Anderson Elec. Connectors*, 736 F.Supp. 253 (N.D.Ala. 1990).

In her complaint, Walker sought relief in the form of back-pay, benefits, lost seniority, loss pension, declaratory and injunctive relief, and attorneys' fees and costs for the alleged Title VII violation. Walker also sought actual and punitive damages for the pendent tort claims. At the pre-trial conference, however, Walker narrowed her grocery list of remedies by dropping her request for a declaratory judgment and an injunction. Walker's position statement, as drafted by Walker and incorporated into the pre-trial order by the court, reads as follows:

> As a result of these discriminatory actions of the defendants, the plaintiff seeks back-pay (including interest), benefits, lost seniority and loss pension. The plaintiff seeks compensatory and punitive damages according to proof against the defendants for invasion of privacy and tort of outrage. The attorney also seeks a reasonable attorney's fee, costs, and expenses of this litigation.

Following four days of trial, the jury returned its verdict through the use of special interrogatories. The jury found that

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[2] The claim of outrage never reached the jury. It was dismissed on a motion for summary judgment.

[3] *Beesley v. The Hartford Fire Insurance Co.*, 717 F.Supp. 781 (N.D.Ala. 1989).

Anderson Electrical had committed acts of sexual harassment against Walker in violation of Title VII and had invaded Walker's privacy. However, the jury also found that Walker had sustained no monetary damage, either in the form compensatory or punitive damages as a proximate result of these violations.[4] In response to the interrogatories involving Local Lodge 2601, the jury determined that the Union had committed no acts of sexual harassment against Walker.

Based on the answers to the special interrogatories, the district court entered final judgment ordering that the "[p]laintiff, Ann Walker, shall have and recover nothing of defendants, or either of them." The court also refused to grant Walker attorneys' fees.

Walker filed several post-trial motions affecting only Anderson Electrical, all of which were denied. In addition to a motion for a new trial on the subject of damages, which is not at issue, all of the motions sought an injunction, a declaratory judgment, nominal damages, and attorneys' fees based on the

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[4]The interrogatories involving Anderson Electrical and the jury's responses to them are reprinted below.

1. Did defendant Anderson Electrical Connectors (Square D), commit any acts of sexual harassment against plaintiff, Ann Walker, in violation of Title VII of the Civil Rights Act of 1964 . . . ?

YES X NO __

2. ONLY if the jury has answered "YES" to Question No. 1, did the said sexual harassment proximately cause plaintiff to lose any time from work?

YES __ NO X

3. ONLY if the jury has answered "YES" to Question No. 1 and "YES" to Question No. 2, state the amount of wages, if any, which plaintiff has proven by a preponderance of the evidence that she lost as a proximate result of defendant Anderson Electrical Connectors' said conduct violating the Civil Rights Act.

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7. Did defendant, Anderson Electrical Connectors (Square D), invade the privacy of the plaintiff, Ann Walker?

YES X NO __

jury finding of sexual harassment and invasion of privacy. 742 F.Supp. 591. The denial of these motions is the subject of this appeal.

II. DISCUSSION

A.

At the outset, Walker argues that the district court abused its discretion by denying her declaratory and injunctive relief in light of the jury's finding of a Title VII violation. We disagree.

Walker's post-trial motion for injunctive and declaratory relief was interpreted by the district court as a post-trial motion to amend the pre-trial order. The pre-trial order stated that Walker would seek only a money award. The district court indicated that Walker's failure to pursue declaratory and injunctive relief in the pre-trial order, where Walker had initially demanded such relief in her complaint, may have been part of a strategy to achieve a jury trial on the Title VII issues. "The

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8. ONLY if the jury has answered "YES" to Question No. 7, did the said invasion of plaintiff's privacy proximately cause plaintiff any injury?

YES __ NO X

9. ONLY if the jury has answered "YES" to Question No. 7 and "YES" to Question No. 8, state the amount of compensatory damages, if any, which plaintiff has proven by a preponderance of the evidence that she sustained as a proximate result of said defendant's invasion of plaintiff's privacy . . .

$____$

10. ONLY if the jury has answered "YES" to Question No. 8 and ONLY if the jury finds that plaintiff, Ann Walker, has proven by clear and convincing evidence that defendant Anderson Electrical Connectors consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff, state the amount of punitive damages to be assessed against defendant, Anderson Electrical Connectors, for the purpose of punishing it and deterring similar future acts of invasion of privacy.

$____$

absence of any prayer for equitable relief," the noted in its Memorandum Opinion of July 9, 1990, "subtracted somewhat from defendant's arguments against trial by jury."[5]

The court denied Walker's motion to amend the pre-trial order citing Fed.R.Civ.P. 16(e), which states that the pre-trial order "shall control the subsequent course of action unless modified by a subsequent order. The order following a final pre-trial conference shall be modified only to prevent manifest injustice."

The district court's decision to follow the pre-trial order can be reversed on appeal only where the district court has abused its discretion. *Randolph County v. Alabama Power Co.*, 784 F.2d 1067, 1072 (11th Cir. 1986), *cert. denied*, 479 U.S. 1032, 107 S.Ct. 878, 93 L.Ed.2d 833 (1987); *Hodges v. United States*, 587 F.2d 1014 (5th Cir. 1979)[6] "[W]e realize that for pretrial procedures to continue as viable mechanisms of court efficiency, appellate courts must exercise minimal interference with trial court discretion in matters such as the modification of its orders." *Hodges*, 597 F.2d at 1018.

While Rule 16(e) requires that the pre-trial order be modified to "prevent manifest injustice," in this case the modification requested by Walker would only serve to work an injustice against the defendant, Anderson Electrical. As the district court pointed out in its Memorandum Opinion of July 9, 1990, "Walker chose her strategy, forcing Anderson Electrical to choose its strategy. It would be disingenuous of any court to

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[5]According to Walker, the fact that declaratory and injunctive relief were not included in the pre-trial order was simple error. "There is nothing in the Record, and no finding by the district court, that the plaintiff knowingly and voluntarily waived [her] request for injunctive and declaratory relief. The failure to mention such relief in the pretrial Order was merely an oversight." Brief for Appellant at 11.

[6]Decisions of the former Fifth Circuit handed down before October 1, 1981 are binding precedent in this circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

find at this late date that this pre-trial order can be modified post-trial in order to 'prevent manifest injustice.' "

We agree with this reasoning and find that the district court did not abuse its discretion in following the pre-trial order. Walker pursued a damages trial and got just that. It would be unfair to Anderson Electrical to give Walker relief which she did not request; relief for which Anderson Electrical was never permitted to establish a defense.

Walker's central argument on this matter is that the district court has not complied with Fed.R.Civ.P. 54(c). Rule 54(c) states, in pertinent part, that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." Applying Rule 54(c) to the facts of her case, Walker contends that she is "entitled" to equitable relief based on the jury's finding of sexual harassment even though she abandoned this claim for relief in the pre-trial conference and actively pursued a monetary award. Walker further contends that Rule 54(c) and Rule 16(e) conflict under these facts and that Rule 54(c) prevails in the event of such a conflict.

We see no conflict and find that Rule 54(c) does not apply to this case. Rule 54(c) requires that the district court grant Walker only the relief to which she is "entitled," even when that relief is not requested in the pleadings. But Walker *did* request a declaratory judgment and an injunction in her pleadings and then abandoned this form of relief at the pre-trial conference in favor of something else, namely a monetary award. Rule 54(c) simply does not sanction this type of maneuvering. We hold that Walker is not entitled to the relief abandoned in the pre-trial order and affirm the district court's denial of her motion for injunctive and declaratory relief.

B.

Walker next argues that a jury finding of sexual harassment in violation of Title VII mandates a court award of one dollar

in nominal damages and that the district court erred by not making such an award. We disagree.

The district court did not instruct the jury on the possibility of awarding nominal damages in the event of a finding of sexual harassment. Walker did not request a charge on nominal damages, nor did she object to the court's failure to make such a charge.[7]

Fed.R.Civ.P. 51, which states that "[n]o party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection," precludes Walker, at this late date, from objecting to the fact that no jury instruction on nominal damages was given at trial. The federal court's long standing policy against additur, as an intrusion on the jury's domain and violation of the Seventh Amendment, also stands in the way of Walker's request for one dollar in nominal damages where the jury awarded none. *See Hattaway v. McMillian*, 903 F.2d 1440, 1451 (11th Cir. 1990); *Dimick v. Schiedt*, 293 U.S. 474, 55 S.Ct. 296, 79 L.Ed. 603 (1935).

Walker argue that *Carey v. Piphus*, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978), requires the automatic award of nominal damages upon the finding of a Title VII violation regardless of Rule 51 and the federal courts' dislike of additur. *Carey* does not, however, address the issue of nominal damages in a Title VII action.

Carey involved interpretation of 42 U.S.C. § 1983,[8] which provides remedy for violations of constitutional rights by per-

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[7]According to Anderson Electrical, the reason that Walker did not take a nominal damages instruction to the jury was because, "[i]f there had been an instruction or jury interrogatory on nominal damages, the jury might have given it, and that was a risk to be avoided by the plaintiff since she was after substantial money." (Brief for Appellee at 39-40).

[8]Title 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes

sons acting under color of state law. Emphasizing the absolute nature of constitutional rights and "the importance to organized society that those rights be scrupulously observed," *Carey*, 435 U.S. at 266, 98 S.Ct. at 1053, the Court mandated the award of nominal damages upon the finding of a procedural due process violation even where no actual injury had been shown. By contrast, this case involves, not a violation of constitutional rights, but merely, a violation of purely statutory rights under Title VII. Nothing in *Carey* mandates the award of nominal damages for statutory violations.[9]

Because we find that the reasoning in *Carey* applies only to violations of constitutional magnitude, we decline Walker's invitation to extend the rationale of *Carey* to Title VII cases and affirm the district court's denial of Walker's post-trial motion for nominal damages.

C.

Finally, we come to the crux of Walker's appeal — attorneys' fees. While an award of nominal damages, an injunction

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to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[9] Only, *Hicks v. Brown Group, Inc.*, 902 F.2d 630 (8th Cir. 1990), *vacated*, ___ U.S. ___, 111 S.Ct. 1299, 113 L.Ed.2d 234 (1991), has extended *Carey* beyond the realm of 42 U.S.C. § 1983 by holding that nominal damages are mandatory upon the finding of racial discrimination in the making and enforcement of contracts in violation of 42 U.S.C. § 1981. However, the validity of *Hicks* is questionable. *Hicks* was vacated and remanded in light of the Eighth Circuit's en banc opinion in *Taggart v. Jefferson County Child Support Enforcement*, 935 F.2d 947 (8th Cir. 1991). *Taggart* overruled *Hicks* on the issue of whether a claim for racially discriminatory termination under 42 U.S.C. § 1981 remains actionable after the Supreme Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989), thereby making the *Hicks* court's pronouncements on the issue of nominal damages moot.

or a declaratory judgment would make the prospect of obtaining attorneys's fees much easier, Walker argues that even without these badges of victory she is a "prevailing party" under 42 U.S.C.§ 2000e-5(k)[10] and entitled to attorneys' fees.

42 U.S.C. § 2000e-5(k) provides, in relevant part, "[i]n any action or proceeding under this subchapter the court, in its discretion, may allow *the prevailing party,* other than the Commission or the United States, a reasonable attorneys' fee as part of the costs." (Emphasis added). In *Texas Teachers Association v. Garland Independent School District,* 489 U.S. 782, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989), the Supreme Court, in a unanimous opinion, found improper the Fifth and Eleventh Circuits' use of the "central issue" test to determine prevailing party status.[11] In its place, the Court established the standard for identifying prevailing parties:

> If the plaintiff has succeeded on "any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit," the plaintiff has crossed the threshold to a fee award of some kind . . . The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute.

Id. at 791-93, 109 S.Ct. at 1493-94 (quoting *Nadeau v. Helgemoe,* 581 F.2d 275, 278-89 (1st Cir. 1978)).

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[10] Though the parties have cited 42 U.S.C. § 1988 as the controlling fee shifting provision in this case, 42 U.S.C. § 2000e-5(k) is the appropriate fee shifting provision in Title VII actions. This distinction is a technical one, however, as Congress intended the standards for awarding fees under these two statutes to be the same. *See* S.Rep. No. 1011, 94th Cong., 2d Sess. 3-4, *reprinted in* 1976 *U.S. Code Cong. & Admin. News* 5908, 5912. *See also Cofield v. City of Atlanta,* 648 F.2d 986, 987 n. 3 (5th Cir. Unit B 1981) ("The language of section 1988 tracks that of section 2000e-5(k).").

[11] Under the central issue test, the plaintiff must achieve the primary relief sought in order to be deemed a "prevailing party." It is not enough to win on an important side issue. *See Martin v. Heckler,* 773 F.2d 1145, 1149 (11th Cir. 1985) *(en banc).*

Walker claims that the jury verdict materially alters the legal relationship between the parties in the same fashion as an injunction or declaratory judgment. But Walker fails to successfully distinguish *Hewitt v. Helms*, 482 U.S. 755, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987) and *Rhodes v. Stewart*, 488 U.S. 1, 109 S.Ct. 202, 102 L.Ed.2d 1 (1988), two Supreme Court cases with similar fact patterns which reject similar arguments. We find these cases controlling.

In *Hewitt*, a plaintiff was denied attorneys' fees, despite a finding by the Third Circuit that his due process rights had been violated. *Hewitt*, 482 U.S. at 757-59, 107 S.Ct. at 2674-75. The plaintiff, a prisoner in the Pennsylvania state prison system, sued prison officials for placing him in disciplinary confinement without due process of law. The district court dismissed the case in a summary judgment motion. On appeal, the Third Circuit reversed, finding that there had, indeed, been a violation of due process. The case was remanded to the district court with instructions to award the plaintiff damages unless the defendants were able to assert an immunity defense. Finding such a defense, the district court again dismissed the case in a motion for summary judgment and in a later ruling denied the plaintiff attorneys' fees. With regard to the denial of attorney's fees, the Third Circuit reversed. Equating its initial finding of a due process violation with a declaratory judgment, the Third Circuit held that the plaintiff was a "prevailing party" under 42 U.S.C. § 1988 and entitled to an award of attorney's fees. The Supreme Court rejected the Third Circuit's rationale and reversed, holding:

> In all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces-the payment of damages, or some specific performance, or the termination of some conduct. Redress is sought *through* the court, but *from* the defendant. This is no less true of a declaratory judgment suit than of any other action. The real value of the judi-

> cial pronouncement — what makes it a proper judicial resolution of a "case or controversy" rather than an advisory opinion — is the settling of some dispute *which affects the behavior of the defendant towards the plaintiff.*

Hewitt, 482 U.S. at 761, 107 S.Ct. at 2676.

Walker argues that *Hewitt* is not controlling because, unlike the plaintiff in *Hewitt,* she has achieved much more than a hollow pronouncement on a matter of law. Walker points out that she won a favorable jury determination on the ultimate factual issue in the case and that this determination was an important part of "settling the score" with her employer. The jury finding of sexual harassment, she contends, has forever changed the legal relationship between the parties by foreclosing the defendant's denial of such sexual harassment.

While we find this argument appealing, it simply does not conform to the basic premise of *Hewitt.* With regards to the plaintiff in *Hewitt,* the Court noted that, "[t]he only 'relief' he received was the moral satisfaction of knowing that a federal court concluded that his rights had been violated." *Hewitt,* 482 U.S. at 762, 107 S.Ct. at 2676. Walker received nothing more. The jury's finding of sexual harassment no more altered the legal relationship between the parties than the Third Circuit's finding of a due process violation in *Hewitt.* And, just as the Third Circuit's finding was an important first step on the road to obtaining relief and "affect[ing] the behavior of the defendant towards the plaintiff," *id.* at 761, 107 S.Ct. at 2676, so too is the jury's finding of sexual harassment an important first step for Walker. But, as *Hewitt* suggests, such a finding, without more, will not ordain a litigant the prevailing party.

The Supreme Court's decision in *Rhodes v. Stewart,* 488 U.S. 1, 109 S.Ct. 202, 102 L.Ed.2d 1 (1988), reinforces our holding today. In *Rhodes,* two plaintiffs obtained a declaratory judgment for violations of their First Amendment rights as prisoners in a state corrections facility. Prior to the court's announcement of declaratory relief, however, one of the plain-

tiffs was released from prison and the other died. The Supreme Court held that the declaratory judgment could not, under those circumstances, affect the legal relationship between the parties. The plaintiffs' victory was moot despite the fact that they were awarded a declaratory judgment. As the Court noted, "[a] declaratory judgment ... is no different from any other judgment. It will constitute relief ... if, and only if, it affects the behavior of the defendant toward the plaintiff." *Rhodes*, 488 U.S. at 4, 109 S.Ct. at 203.

While the jury's finding of sexual harassment in this case is not moot as it concerns Walker, Walker did not attain even a declaratory judgment as did the plaintiffs in *Rhodes*. Instead, Walker's only claim to the spoils of victory is a jury finding of sexual harassment. "That is not the stuff of which legal victories were made." *Hewitt*, 482 U.S. at 760, 107 S.Ct. at 2675. Therefore, in accordance with *Hewitt* and *Rhodes*, we hold that to be a prevailing party for purposes of 42 U.S.C. § 2000e-5(k), requires the attainment of something more tangible than a jury finding of sexual harassment. The district court did not err in denying Walkers' request for attorney's fees.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's denial of Walker's post-trial motions for declaratory and injunctive relief, nominal damages, and attorneys' fees.